

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION**

TAVNER COOK,  
Petitioner,  
v.  
JUDGE KALRA S. UPINDER,  
Respondent.

No. 2:23-cv-01107-DOC-BFM

**ORDER TO SHOW CAUSE  
WHY HABEAS PETITION  
SHOULD NOT BE DISMISSED**

## **SUMMARY OF ORDER**

This is a federal habeas petition challenging a state conviction. Petitioner Tavner Cook is serving a 40-year sentence following his convictions for second degree murder and related gang and firearm enhancements. His Petition raises three claims: a Fourth Amendment claim premised on a search of his cell phone (Ground One); a Fifth Amendment claim concerning the use of undercover informants in his jail cell (Ground Two); and a claim of instructional error (Ground Three). But before a petitioner can file a federal habeas petition in federal court, he must present his claims to the highest state court—a process called “exhaustion.” From what Petitioner has provided and from publicly

available dockets, it appears that Petitioner has only exhausted Ground Three, the instructional error claim, and that the two remaining claims are unexhausted. A petition containing both exhausted and unexhausted claims is subject to dismissal. The Court therefore orders Petitioner to explain whether he has presented Grounds One and Two to the California Supreme Court. If he has not, he must tell the Court if he wants to dismiss the unexhausted claims, or dismiss the Petition in its entirety, or if he wants to seek a stay of this federal action while he pursues state court exhaustion.

The Petition has three other problems that could potentially be addressed in an amended pleading. First, Petitioner’s claim in Ground One appears to be barred under the Supreme Court’s decision in *Stone v. Powell*, 428 U.S. 465 (1976). That case holds that a state prisoner may not raise a Fourth Amendment claim in a federal habeas action if he or she had the opportunity for “full and fair” consideration of the claim in state court. 428 U.S. at 494. Second, Petitioner in Ground Two fails to state a claim for federal habeas relief. And third, Petitioner failed to name the proper respondent.

If Petitioner fails to timely respond to this order, the Court will recommend that his Petition be dismissed for failure to exhaust.

## BACKGROUND

#### A. Petitioner's State Court Conviction

Petitioner was convicted of second-degree murder in connection with a gang-related shooting.<sup>1</sup> Of relevance to Ground One in the Petition, trial evidence showed that after the shooting, the victim's sister (who was also a

<sup>1</sup> The California Court of Appeal provided a detailed summary of the facts underlying the conviction in its order denying his direct appeal. (See ECF No. 1 at 23-49). The Court recites only those facts relevant to the claims in the Petition and this Order to Show Cause.

1 witness to the crime) received a text message from a friend. The message  
2 contained a picture of a cell phone displaying a photograph of Petitioner. The  
3 friend stated that he found the cell phone at the scene of the shooting. The  
4 victim's sister identified Petitioner as the shooter from the photograph. The cell  
5 phone was ultimately given to a police officer, who noticed that it was turned on  
6 and logged into an Instagram account. The officer scrolled through the account  
7 and saw around 30 to 40 pictures of Petitioner. (See ECF No. 1 at 29.)

8 Of relevance to Ground Two, the trial evidence showed that after  
9 Petitioner was arrested, he was placed in a jail cell along with two undercover  
10 informants as part of a *Perkins* operation to elicit incriminating statements.<sup>2</sup>  
11 Petitioner made statements about the shooting that were audio recorded and  
12 played for the jury. (See *id.* at 31-32.)

13 **B. Claims in Federal Habeas Petition**

14 Petitioner filed his Petition in this Court on February 13, 2023. (ECF No.  
15 1). He asserts the following three grounds for relief challenging his conviction.

16 **1. Ground One**

17 Petitioner asserts that the Fourth Amendment was violated and states  
18 the following facts in support: after the search of the crime scene by police  
19 officers, his unlocked cell phone was "illegally entered by a certain party." (*Id.*  
20 at 6.) A "picture of [Petitioner] was then taken . . . by a certain party['s] cell  
21 phone" and was texted to the victim's sister before the cell phone was given to  
22 the "returning officers." (*Id.*) An officer noticed the phone was logged into an  
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26 <sup>2</sup> In a *Perkins* operation, an undercover government agent is placed in a cell  
27 with the suspect. The agent is not required to give *Miranda* warnings before  
28 questioning or interacting with the suspect. *Illinois v. Perkins*, 496 U.S. 292,  
294, 296 (1990).

1 Instagram account that displayed numerous photographs of Petitioner. (*Id.*)

2       **2. Ground Two**

3 Petitioner asserts that the Fifth Amendment was violated because the  
4 *Perkins* operation “was put into effect to entrap [him].” (*Id.* at 6-7.)

5       **3. Ground Three**

6 Petitioner states that the Sixth Amendment was violated and in support  
7 references pages 39 to 50 of his Petition for Review filed in the California  
8 Supreme Court, which he attached to the Petition. (*Id.* at 7, 50.) In that section  
9 of the Petition for Review, petitioner argues that instructing the jury with  
10 CALCRIM No. 315 violated his due process rights because the instruction  
11 erroneously directed the jury to consider eyewitness identification certainty  
12 when deciding how much weight to give to the witness’s testimony. (*Id.* at 88-  
13 96.)

14       **C. Facts About Exhaustion**

15 In his direct appeal of his conviction, Petitioner raised the following  
16 claims: (1) he was denied his Fourth Amendment right to freedom from a  
17 warrantless seizure of his person when the trial court found an independent  
18 source for his arrest after quashing the arrest warrant and finding no good faith;  
19 (2) the trial court erred in holding an in camera informant hearing without the  
20 informants present and in refusing to disclose the identity of the *Perkins*  
21 undercover informants; and (3) the trial court’s instruction of the jury with  
22 CALCRIM No. 315 violated due process. (*Id.* at 19-22.) The California Court of  
23 Appeal affirmed the judgement in a reasoned decision. (*Id.* at 23-49.) Petitioner  
24 raised the same three claims in his Petition for Review. (*Id.* at 51-53.) The  
25 California Supreme Court summarily denied review on April 27, 2022. (See  
26 California Appellate Courts website at [appellatecases.courtinfo.ca.gov](http://appellatecases.courtinfo.ca.gov).)

27       The California Court of Appeal’s docket reflects that on February 21,  
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1 2023, approximately a week after filing his Petition in this Court, Petitioner  
2 filed a habeas petition in the appellate court. (*See* California Appellate Courts  
3 website at [appellatecases.courtinfo.ca.gov](http://appellatecases.courtinfo.ca.gov).)<sup>3</sup> The petition was denied on March  
4 24, 2023, in an order stating the following:

5           The petition for writ of habeas corpus filed February 21, 2023,  
6 has been read and considered. It is denied because it raises vague  
7 and conclusory allegations without any explanation of the basis for  
8 the allegations. (*In re Swain* (1949) 34 Cal.2d 300, 303-304.)  
9 Moreover, the petition raises claims which could have been raised  
10 on appeal, but were not, and petitioner has failed to allege facts  
11 establishing an exception to the rule barring habeas consideration  
12 of claims that could have been raised on appeal. (*In re Reno* (2012)  
13 55 Cal.4<sup>th</sup> 428, 490-493.)

14           (See *id.*)

15           A search of the docket of the California Supreme Court does not show any  
16 other filings by Petitioner. (See *id.*)

## ANALYSIS

17           Rule 4 of the Rules Governing Section 2254 Cases in the United States  
18 District Courts allows a district court to dismiss a petition if it “plainly appears  
19 from the petition and any attached exhibits that the petitioner is not entitled to  
20 relief in the district court . . . .” Rule 4 of the Rules Governing Section 2254  
21 Cases. Based upon the Petition and the California state court records available  
22 to the Court, and for the reasons discussed below, the Court **orders Petitioner**  
23 **to show cause why the Petition should not be dismissed for failure to**

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27           <sup>3</sup> A copy of this state petition is not part of the record. The Court therefore  
28 cannot ascertain what claims were raised in this petition.

1       **exhaust.**

2       **A.     Failure to Exhaust Grounds One and Two**

3           A state prisoner must exhaust his state court remedies before a federal  
 4           court may consider granting habeas corpus relief. *See* 28 U.S.C. § 2254(b)(1)(A);  
 5           *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999). To satisfy the exhaustion  
 6           requirement, a habeas petitioner must “give the State the opportunity to pass  
 7           upon and correct alleged violations of its prisoners’ federal rights.” *Duncan v.*  
 8           *Henry*, 513 U.S. 364, 365 (1995) (citation and quotation marks omitted). For a  
 9           petitioner in California state custody, this generally means that the petitioner  
 10          must have fairly presented his federal claims to the California Supreme Court.  
 11          *See O'Sullivan*, 526 U.S. at 845 (interpreting 28 U.S.C. § 2254(c)); *see also Gatlin*  
 12          *v. Madding*, 189 F.3d 882, 888 (9th Cir. 1999) (applying *O'Sullivan* to  
 13          California). A claim has been fairly presented if the petitioner presents “both  
 14          the operative facts and the federal legal theory on which his claim is based.”  
 15          *Davis v. Silva*, 511 F.3d 1005, 1009 (9th Cir. 2008) (citation and quotation marks  
 16          omitted); *Gray v. Netherland*, 518 U.S. 152, 162-63 (1996).

17           A “mixed” petition is a petition containing both exhausted and  
 18          unexhausted claims. Under controlling precedent, a mixed petition is subject to  
 19          dismissal without prejudice. *See Rose v. Lundy*, 455 U.S. 509, 522 (1982) (“In  
 20          sum, because a total exhaustion rule promotes comity and does not  
 21          unreasonably impair the prisoner’s right to relief, we hold that a district court  
 22          must dismiss habeas petitions containing both unexhausted and exhausted  
 23          claims.”). The Court may raise a petitioner’s failure to exhaust sua sponte—that  
 24          is, even without the opposing party raising it—and may summarily dismiss a  
 25          petition without prejudice for failure to exhaust. *See Stone v. San Francisco*, 968  
 26          F.2d 850, 855-56 (9th Cir. 1992); *Cartwright v. Cupp*, 650 F.2d 1103, 1104 (9th

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1 Cir. 1981).

2 In his Petition, Petitioner indicates that he exhausted Grounds One and  
3 Two in his Petition for Review. (*See* ECF No. 1 at 6-7.) But the allegations in  
4 Grounds One and Two are not the same as the claims he presented to the  
5 California Supreme Court on direct appeal. The Petition's Ground One, the  
6 Fourth Amendment claim, asserts that Petitioner's cell phone was "illegally  
7 entered" and a photograph of him was texted to the victim's sister before the cell  
8 phone was given to the police. (*Id.* at 6.) In contrast, the Fourth Amendment  
9 claim he presented on direct review asserts he was subjected to a warrantless  
10 arrest. (*Id.* at 36-43.) In Ground Two of the Petition, he asserts that the Fifth  
11 Amendment was violated because the *Perkins* operation was carried out to  
12 entrap him. (*Id.* at 6.) On direct appeal, his *Perkins*-related claim challenged the  
13 trial court's refusal to disclose the identity of the undercover informants. (*Id.* at  
14 43-46.) As shown, there is no overlap between Grounds One and Two and the  
15 claims Petitioner raised in his direct appeal. And while he recently filed a  
16 habeas petition in the California Court of Appeal, the Court is not aware of any  
17 filings in the California Supreme Court in which he could have exhausted his  
18 claims.

19 Based on the foregoing, Grounds One and Two appear to be unexhausted.  
20 The Petition is therefore subject to dismissal as a "mixed" Petition. *See* 28 U.S.C.  
21 § 2254(b)(1)(A).

22 If Petitioner contends that he has in fact exhausted his claims in Grounds  
23 One and Two, he must promptly inform the Court that he has fairly presented  
24 these claims to the California Supreme Court and attach a copy of the California  
25 Supreme Court's denial.

26 On the other hand, if Petitioner has not already exhausted Grounds One  
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1 and Two, he has the following four options:

2       *Option 1:* Petitioner may request a voluntary dismissal of the entire action  
3 under Federal Rule of Civil Procedure 41(a). Such a dismissal would be without  
4 prejudice to Petitioner refiling his claims once they are exhausted in the state  
5 court. The Court warns Petitioner that any dismissed claims may be later  
6 subject to the federal statute of limitations for habeas claims: “[a] 1-year period  
7 of limitation shall apply to an application for a writ of habeas corpus by a person  
8 in custody pursuant to the judgment of a State court.” *See also* 28 U.S.C. 2244  
9 (d)(1). To proceed under Option 1, Petitioner may use the attached Form CV-09  
10 (Notice of Dismissal Pursuant to Federal Rules of Civil Procedure 31(a) or (c)).

11       *Option 2:* Petitioner may request a voluntary dismissal of his unexhausted  
12 claims (Grounds One and Two) and elect to proceed only on his exhausted claim  
13 (Ground Three). Petitioner is advised that if he elects to proceed with his  
14 exhausted claim, any future habeas petition containing the dismissed claims, or  
15 any other claims that could have been raised in the instant Petition, may be  
16 rejected as successive. To proceed under Option 2, Petitioner must file a  
17 declaration, signed under penalty of perjury, stating that he elects to dismiss  
18 his unexhausted Grounds One and Two and proceed in this action only with his  
19 exhausted Ground Three.

20       *Option 3:* Petitioner may ask the Court for a *Rhines* stay while he pursues  
21 exhaustion in the state courts. *See Rhines v. Weber*, 544 U.S. 269 (2005)  
22 (authorizing stays of “mixed” petitions). To obtain a *Rhines* stay, a petitioner  
23 must show: (1) that there is good cause for the failure to exhaust; (2) that the  
24 unexhausted claims are potentially meritorious; and (3) that the petitioner did  
25 not intentionally delay pursuing exhaustion in the state courts. *Id.* at 278.  
26 Petitioner is cautioned that at this time the Court would not be inclined to grant  
27 a *Rhines* stay given that, as discussed below, Ground One appears to be barred  
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1 and Ground Two fails to state a claim for federal habeas relief.

2       *Option 4:* Pursuant to *Kelly v. Small*, 315 F.3d 1063 (9th Cir. 2002),  
3 Petitioner can dismiss his unexhausted claims (Grounds One and Two) and the  
4 Court can stay his remaining exhausted claim (Ground Three) while he returns  
5 to state court to exhaust his dismissed claims. A *Kelly* stay does not require a  
6 showing of good cause. But Petitioner is warned that “[a] petitioner seeking to  
7 use the *Kelly* procedure will be able to amend his unexhausted claims back into  
8 his federal petition once he has exhausted them only if those claims are  
9 determined to be timely.” *King v. Ryan*, 564 F.3d 1133, 1140-41 (9th Cir. 2009).  
10 To proceed under Option 4, Petitioner must file a declaration, signed under  
11 penalty of perjury, electing a stay pursuant to *Kelly*, and stating that he  
12 dismisses Grounds One and Two.

13       **B. Ground One Is Not Cognizable**

14       If Petitioner decides to proceed with his Petition, there are other issues  
15 with his Petition that he will need to address.

16       First, the Fourth Amendment challenge alleged in Ground One appears  
17 to be barred pursuant to the rule in *Stone v. Powell*. The Supreme Court in *Stone*  
18 held that “where the State has provided an opportunity for full and fair  
19 litigation of a Fourth Amendment claim, a state prisoner may not be granted  
20 federal habeas corpus relief on the ground that evidence obtained in an  
21 unconstitutional search or seizure was introduced at his trial.” *Stone*, 428 U.S.  
22 at 494. Under *Stone*, “[a] Fourth Amendment claim is not cognizable in federal  
23 habeas proceedings if a petitioner has had a full and fair opportunity to litigate  
24 the claim in state court.” *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 899 (9th Cir.  
25 1996).

26       “The relevant inquiry is whether petitioner had the opportunity to litigate  
27 his claim, not whether he did in fact do so or even whether the claim was  
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1 correctly decided.” *Ortiz-Sandoval*, 81 F.3d at 899 (9th Cir. 1996). California  
2 provides criminal defendants with a full and fair opportunity to litigate Fourth  
3 Amendment claims through the remedy provided by California Penal Code  
4 section 1538.5. This provision permits a defendant to file a motion to suppress  
5 evidence on the ground that it was obtained in violation of the Fourth  
6 Amendment. *See Gordon v. Duran*, 895 F.2d 610, 613 (9th Cir. 1990).

7 Here, even if Petitioner did not litigate his Fourth Amendment claim in  
8 state court, it appears that he had the opportunity to do so. From a review of  
9 the Petition and attachments, there is no indication that Petitioner was  
10 prevented from filing a motion to suppress under section 1538.5. Accordingly,  
11 under *Stone*, Ground One appears to not be cognizable on federal habeas review.

12 **C. Ground Two Fails to State a Claim**

13 Second, Ground Two is defective because it fails to state a claim for federal  
14 habeas relief. Rule 2(c) of the Rules Governing Habeas Corpus cases requires  
15 the petitioner to “specify all the grounds for relief available to [him or her]” and  
16 “state the facts supporting each ground.” Rule 2(c), Rules Governing Section  
17 2254 Cases, 28 U.S.C. foll. § 2254; *see also* Advisory Committee Note to Rule 4,  
18 Rules Governing Section 2254 Cases Habeas Corpus Cases (“[N]otice’ pleading  
19 is not sufficient, for the petition is expected to state facts that point to a real  
20 possibility of constitutional error.”) (citation and some quotation marks  
21 omitted).

22 A prime purpose of Rule 2(c)’s demand that habeas petitioners plead with  
23 particularity is to assist the district court in determining whether the petitioner  
24 may be entitled to relief and, in turn, whether respondent should be ordered to  
25 address the allegations in the petition. *Mayle v. Felix*, 545 U.S. 644, 655-56  
26 (2005) (citing 28 U.S.C. § 2253). Summary dismissal of a habeas petition is  
27 appropriate when the allegations are vague or conclusory, or “palpably  
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1 incredible.” *Hendricks v. Vasquez*, 908 F.2d 490, 491 (9th Cir. 1990) (citations  
2 and quotation marks omitted).

3 Petitioner’s Fifth Amendment claim in Ground Two is not supported by  
4 any specific factual allegations that would entitle him to habeas relief if they  
5 were true. His assertion that the *Perkins* operation was utilized to entrap him  
6 fails to state a federal habeas claim. “Entrapment” is an affirmative defense, not  
7 a constitutional violation. *See United States v. Gurolla*, 333 F.3d 944, 951 (9th  
8 Cir. 2003). Moreover, a *Perkins* operation is a lawfully permitted ruse by  
9 government agents to elicit incriminating statements from a suspect and has  
10 nothing to do with inducing a suspect to commit a crime. *See id.* (entrapment  
11 defense contains two elements: government inducement of a crime and absence  
12 of predisposition on the part of defendant). Petitioner does not allege any facts  
13 suggesting that he was coerced into making his jail cell statements or facts that  
14 otherwise challenge the voluntariness of his statements. For these reasons, his  
15 allegations in Ground Two are too conclusory to state a claim for federal habeas  
16 relief.

17 **D. Failure to Name the Proper Respondent**

18 Third, a petitioner seeking habeas corpus relief must name the state  
19 officer having custody of him as the respondent to the Petition. See Rule 2(a),  
20 Rules Governing Section 2254 Cases in the United States District Courts. This  
21 person typically is the warden of the institution where the petitioner is  
22 incarcerated. *Stanley v. Cal. Sup. Ct.*, 21 F.3d 359, 360 (9th Cir. 1994);  
23 *Brittingham v. United States*, 982 F.2d 378, 379 (9th Cir. 1992) (per curiam)  
24 (explaining that a federal habeas petitioner’s immediate custodian is the only  
25 party that can produce “the body” of the petitioner). Here, Petitioner incorrectly  
26 names a judge as respondent, instead of the warden of his prison.

27 The failure to name a proper respondent requires dismissal for lack of  
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1 jurisdiction, *Stanley*, 21 F.3d at 360, but this is a fixable problem. As explained  
2 below, Petitioner can correct this error by naming the proper respondent in an  
3 amended pleading.

4 **E. Order to Show Cause**

5 Before the Court recommends dismissal of the action, the Court will give  
6 Petitioner an opportunity to respond. Petitioner is **ORDERED to show cause**  
7 **why the Court should not recommend dismissal of the Petition for**  
8 **failure to exhaust Grounds One and Two. By no later than July 21, 2023,**  
9 Petitioner shall file a Response addressing the exhaustion issue as follows: (1)  
10 if Petitioner agrees that Grounds One and Two are unexhausted, he shall state  
11 so clearly and inform the Court which of the four options he elects to take (that  
12 is, whether he seeks to dismiss the entire Petition or just dismiss Grounds One  
13 and Two, or whether he elects to seek a *Rhines* stay or a *Kelly* stay); or (2) if  
14 Petitioner asserts that Grounds One and Two are in fact exhausted, he must  
15 demonstrate that he fairly presented the claims to the California Supreme  
16 Court and that the claims were denied.

17 If Petitioner decides to move forward with his Petition, he must address  
18 the other noted problems. To correct the jurisdictional defect caused by naming  
19 the wrong respondent, Petitioner should name the proper respondent in his  
20 proposed Amended Petition. The proposed Amended Petition must be clearly  
21 labeled “Amended Petition” and have the same case number (No. 2:23-cv-01107-  
22 DOC-BFM). The proposed Amended Petition must utilize the form petition (CV-  
23 069) that will accompany this Order. It must contain ALL the grounds for relief  
24 that Petitioner intends to pursue. In particular, Petitioner must clearly state  
25 each federal constitutional violation that he alleges has occurred and clearly  
26 state the facts that support each claim. Petitioner is advised that if he includes  
27 a Fourth Amendment claim in the proposed Amended Petition, he should also  
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1 explain why it is not barred under *Stone v. Powell*.  
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\* \* \*

3 **Along with this Order to Show Cause, the Court Clerk is directed**  
4 **to send petitioner a blank Central District Petition for Writ of Habeas**  
5 **Corpus by a Person in State Custody (Form CV-069), and a blank**  
6 **Central District "Notice of Dismissal Pursuant to Federal Rules of Civil**  
7 **Procedure 41(a) or (c)" (Form CV-09).**

8 **Petitioner's failure to file a timely response as ordered may result**  
9 **in the Court recommending that his case be dismissed for failure to**  
10 **exhaust and/or for failure to prosecute and to follow court orders.**

11  
12 DATED: June 30, 2023



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14 BRIANNA FULLER MIRCHEFF  
15 UNITED STATES MAGISTRATE JUDGE  
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